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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

DORA SOLARES, Plaintiff, **v.** **RALPH DIAZ, et al.,** Defendants.	1:20-cv-00323-NONE-BAM **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT** Date: July 17, 2020 Time: 9:00 a.m. Courtroom: 8, 6th Floor Judge: The Honorable Barbara A. McAuliffe Trial Date: Not set Action Filed: March 2, 2020

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INTRODUCTION

Plaintiff Dora Solares asserts that R. Diaz, the Secretary of the California Department of Corrections and Rehabilitation (CDCR), K. Clark, the warden at California State Prison, Corcoran (Corcoran), and J. Burns, a sergeant at California State Prison, Corcoran (collectively "Defendants"), are liable in their official capacities for the death of her son, Luis Romero.

As state officials, Defendants enjoy sovereign immunity from claims for damages brought against them in their official capacities in federal court. All claims against Defendants are brought against them in their official capacities, and the only relief sought is monetary damages. Accordingly, all claims in the complaint should be dismissed.

In addition, all claims against moving Defendants should be dismissed for failure to state facts sufficient to support a claim under either federal or state law. The complaint is almost entirely devoid of factual matter as to Defendants' conduct, and instead consists of formulaic recitations of the elements of each cause of action. The complaint fails to inform Defendants of what they are alleged to have done wrong and should therefore be dismissed.

Defendants are also entitled to qualified immunity as to Plaintiff's federal claims, and statutory immunities as to the state-law claims. Plaintiff fails to plead any recoverable damages for the state-law negligent-supervision claim. Plaintiff's second cause of action, for failure to protect a pretrial detainee, fails because the complaint does not identify any pretrial detainee. And Plaintiff has not joined a necessary party to the seventh cause of action for wrongful death. The complaint should be dismissed in its entirety.

ALLEGATIONS

Plaintiff Solares alleges as follows:

Plaintiff Solares is the mother of Decedent Luis Romero. (Compl. ¶ 4.) On or about March 7, 2019, Decedent was transferred from Mule Creek State Prison to California State Prison, Corcoran. (Compl. ¶ 14.) Corcoran officials, including Defendant Burns, did not follow the usual protocol before housing inmates together, and housed Romero in a cell with inmate Jaime Osuna. (*Id.*) Osuna had been convicted of a 2011 murder, and CDCR possessed documents

showing he was extremely violent. (Compl. ¶ 16.) Osuna had also been charged with attempted murder based on an incident that occurred at Kern County Jail while Osuna was awaiting trial in 2011. (Compl. ¶ 16.) In 2012, Osuna found his way into another inmate's cell and stabbed that inmate. (Compl. ¶ 17.) Plaintiff believes Osuna had never previously been assigned a cellmate since his CDCR commitment in 2012. (Compl. ¶ 16.)

After housing Osuna and Romero together, CDCR officials did not conduct hourly safety checks on the cell. (Compl. ¶ 20.) On March 8, 2019, Osuna murdered Romero and dismembered Romero's body. (Compl. ¶ 21.) Staff discovered the murder on the morning of March 9, 2019. (Compl. ¶ 1.)

As the warden at Corcoran, Clark was responsible for ensuring that proper procedures were followed, but he failed to properly supervise his subordinates. (Compl. ¶ 19.) Defendants Clark and Diaz failed to establish a procedure to document and track inmates' agreements to be housed together, and failed to properly supervise subordinates with regard to inmates' sharing cells. (Compl. ¶ 19.)

Plaintiff asserts seven causes of action against Defendants Diaz, Clark, and Burns, for: (1) Deliberate Indifference; (2) Failure to Intervene to Protect Pretrial Detainee; (3) Supervisory Liability; (4) Loss of Familial Relations; (5) Conspiracy to Violate Civil Rights; (6) Negligent Supervision; and (7) Wrongful Death. (Compl. 10-16.) Plaintiff further asserts an eighth case of action for failure to summon medical care against unidentified Doe defendants only. (Compl. 16-17.)

STANDARD ON MOTION TO DISMISS

A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"

Erickson v. Pardus, 551 U.S. 89, 93 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Dismissal is proper where the complaint does not contain enough factual allegations, when taken as true, to establish "plausible," as opposed to merely "possible" or "speculative," entitlement to relief. *Bell Atlantic Corp.*, 550 U.S. at 555. Although detailed factual allegations are not required, Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Bell Atlantic Corp.*, 550 U.S. at 555, 557).

In evaluating a motion to dismiss under Rule 12(b)(6), a court must assume the truth of the facts presented and construe all inferences from them in the light most favorable to the nonmoving party. *Erickson*, 551 U.S. at 94. However, courts should not "supply essential elements of the claim that were not initially pled." *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Additionally, courts "are not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

LEGAL ARGUMENT

I. DEFENDANTS ARE ENTITLED TO SOVEREIGN IMMUNITY FROM PLAINTIFF'S CLAIMS.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although the amendment does not by its terms prohibit an action against a state by one of the state's own citizens, the Supreme Court has recognized such a prohibition. *See Welch v. State Dep't of Highways & Public Transp.*, 483 U.S. 468 (1987) (plurality) (citing *Hans v. Louisiana*, 134 U.S. 1, 10 (1890)). The immunity extends to claims arising under both state law, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984), and federal law,

Quern v. Jordan, 440 U.S. 332, 341 (1979). The Eleventh Amendment "precludes the adjudication of pendent state law claims against nonconsenting state defendants in federal courts." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004)

"The Eleventh Amendment bars suits against a state or its agencies, regardless of the relief sought, unless the state unequivocally consents to a waiver of its immunity." *Wilbur v. Locke*, 423 F.3d 1101, 1111 (9th Cir. 2005). "A state's waiver of sovereign immunity in its own courts does not effect a waiver of its eleventh amendment immunity in the federal courts." *BV Eng'g v. Univ. of Cal., L.A.*, 858 F.2d 1394, 1396 (9th Cir. 1988). The Ninth Circuit has held that California did not waive its Eleventh Amendment immunity by enacting the California Tort Claims Act. *Riggle v. State of Cal.*, 577 F.2d 579, 586 (9th Cir. 1978). In addition, "[t]he Eleventh Amendment bars suits for money damages in federal court against . . . state officials in their official capacities." *Aholelei v. Dept. of Public Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007) (citations omitted); *see also Holley v. Cal. Dep't of Corr.*, 599 F.3d 1108, 1111 (9th Cir. 2010) ("For sovereign-immunity purposes, we treat [a] suit against state officials in their official capacities as a suit against the state of California.").

Plaintiff sues Defendants Clark, Burns, and Diaz, each of whom are state officials, in their official capacities, for damages only. (Compl. ¶¶ 5-7; Compl. 17.) Accordingly, Defendants enjoy sovereign immunity from these claims. *See, e.g., Holley*, 599 F.3d at 1111; *see also Rounds v. Or. State Bd. of Higher Educ.*, 166 F.3d 1032, 1036 (9th Cir. 1999) (noting a "narrow exception to Eleventh Amendment immunity for certain suits seeking declaratory and injunctive relief," which does not apply here).

Plaintiff may argue that the caption of the complaint names Defendant Burns in his individual and official capacity, although it still names Diaz and Clark only in their official capacities. (*See* Compl. 1.) That shows only that the caption and body of Plaintiff's complaint are inconsistent with one another. "Such inconsistent naming precludes opposing parties from deducing whether Plaintiff makes any claims against them and identifying which claims Plaintiff makes against which defendant," and subjects the complaint to dismissal. *Foster v. C.D.C.R.*, No. CV 15-6543-DMG-KK, 2015 U.S. Dist. LEXIS 129493, at *5-6 (C.D. Cal. Sep. 25, 2015).

Accordingly, to the extent the claims against Burns are ambiguous as to the capacity in which he is sued, they should be dismissed because they do not provide Defendant with fair notice of the claims.

As stated in the body of the complaint, Defendants are sued in their official capacities. They are therefore immune from Plaintiff's claims, and their motion to dismiss should be granted.

II. PLAINTIFF FAILS TO STATE A CLAIM FOR DELIBERATE INDIFFERENCE.

Plaintiff's first cause of action is for "deliberate indifference to serious safety needs" under the Eighth and Fourteenth Amendment against Defendant Burns and Does 1-15. To establish a Constitutional violation based on a failure to protect Decedent from attacks by another inmate, Plaintiff must show: (1) that officials exposed Decedent to an objectively substantial risk of serious harm; and (2) that the officials were deliberately indifferent to that risk — that is, that they knew of the substantial risk, but disregarded it. *See Hearns v. Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005). "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Further, liability under § 1983 requires a showing that a defendant's personal involvement or failure to perform legally required duties caused the plaintiff's constitutionally protected rights to be violated. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

Here, Plaintiff pleads no facts showing that Defendant Burns knew of, and disregarded, a substantial risk of serious harm to Decedent. The only fact alleged against Burns is that he "ignored the usual protocol required before placing one inmate in the cell of another." (Compl. ¶ 14.) According to Plaintff, the usual protocol was to determine whether two inmates are an appropriate fit as cellmates, then have each inmate sign forms agreeing to be celled together. (Compl. ¶ 15.) The assertion that Burns ignored that protocol does not show that Burns knew of a substantial risk of serious harm to Decedent, and disregarded it. Rather it shows only that Burns did not follow the usual protocol. Moreover, the allegations do not show that there would have been a different result if the protocol were followed. Accordingly, the pleading does not show the required element of causation. *See Leer*, 844 F.2d at 633.

Plaintiff also makes allegations that "Defendants" — a term that includes fifteen Does — "were on notice that Jaime Osuna posed a threat to other inmates and should not share a cell with anyone." (Compl. ¶ 16.) Without factual support, those generic allegations are nothing more than a "formulaic recitation of the elements" of the cause of action. *Twombly*, 550 U.S. at 555. That type of "naked assertion" devoid of "further factual enhancement" is insufficient to state a claim in federal court. *Id.* at 557. While Plaintiff alleges that Osuna was dangerous, and that non-defendant "CDCR" was in possession of documents showing the danger (Compl. ¶ 16), the complaint does not allege that Burns was aware of any of the documents or incidents cited. (Compl. ¶¶ 16-17.)

To state a viable § 1983 claim, Plaintiff must, "at a minimum, allege facts which demonstrate the specific acts each individual defendant did and how that individual's alleged misconduct specifically violated plaintiff's constitutional rights." *El-Shaddai v. Zamora*, No. CV 13-2327 RGK (JC), 2017 U.S. Dist. LEXIS 122680, at *19 (C.D. Cal. Aug. 3, 2017) (emphasis in original) (citing *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002); *see also Henry A. v. Willden*, 678 F.3d 991, 1004 (9th Cir. 2012) (rejecting allegations referring only to "Defendants" as insufficiently specific). There are no facts alleged showing that Burns knew that Romero was in substantial risk of serious harm, and disregarded that risk. (Compl. ¶¶ 14-23.) Plaintiff's generalized and conclusory allegations that Defendants "were on notice" that Osuna should not be double-celled are insufficient to state a cognizable claim for failure to protect, and Plaintiff's' deliberate indifference claim should be dismissed.

III. PLAINTIFF FAILS TO STATE A CLAIM FOR FAILURE TO INTERVENE TO PROTECT PRE-TRIAL DETAINEE IN CUSTODY.

For their second cause of action, Defendants allege "Failure to Intervene to Protect Pre-Trial Detainee in Custody" against Diaz, Clark, Burns, and Does 1-15. (Compl. 11.) "Inmates who sue prison officials for injuries suffered while in custody may do so under the Eighth Amendment's Cruel and Unusual Punishment Clause or, if not yet convicted, under the Fourteenth Amendment's Due Process Clause." *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1067-68 (9th Cir. 2016). The standard for the Fourteenth Amendment failure to protect claim is

slightly different from that for the same claim under the Eighth Amendment. *See id.* at 1071 (establishing elements of pretrial detainee's failure to protect claim); *Crowder v. Riverside County Sheriff's Dep't*, No. CV 17-2362-CAS (JR), 2018 U.S. Dist. LEXIS 236064, *5 (C.D. Cal. Jan. 16, 2018) ("The same analytical framework applies to both theories, however, though the 14th Amendment standard for failure-to-protect claims is more generous than that of the Eighth Amendment.")

Here, Plaintiff alleges that Romero was a CDCR inmate, not a pretrial detainee. (Compl. ¶ 1; *see also* Cal. Penal Code § 5000 et seq. (establishing California Department of Corrections and Rehabilitation).) Accordingly, a failure to protect claim under the Fourteenth Amendment analysis is not available. While the Complaint does mention the Eighth Amendment in this cause of action (Compl. ¶ 35), it is clear from the pleading that Plaintiff was attempting to plead the Fourteenth Amendment standard under *Castro* (and it would otherwise be duplicative of Plaintiff's first cause of action). *Compare* Compl. ¶¶ 35-37 (asserting that Defendants made an "intentional decision with respect to the conditions under which Romero was confined," that Defendants "did not take reasonable available measures to abate that risk," and that "by not taking such measures," Plaintiff was injured), *with Castro*, 833 F.3d at 1071 (establishing the elements of a pretrial detainee's failure to protect claim as including that defendant made an "intentional decision with respect to the conditions under which the plaintiff was confined," that defendant "did not take reasonable available measures to abate that risk," and that "[b]y not taking such measures," plaintiff was injured). Because Decedent was not a pretrial detainee, Plaintiff's second cause of action should be dismissed.

Moreover, even if Plaintiff had alleged Decedent was a pretrial detainee, the complaint does not allege sufficient facts to support that failure-to-protect claim. Plaintiff does not allege any facts showing that Diaz, Burns, or Clark made an intentional decision regarding Romero's conditions of confinement that put Romero at substantial risk of serious harm. (Compl. ¶¶ 14-23.)

Specifically, the complaint does not assert that any of these Defendants made an intentional decision to put Romero in harm's way. (*Id.*) As stated above with regard to Burns, all that is

alleged is that he did not follow the usual protocol for housing inmates together. (Compl. ¶ 14.) That does not show an intentional decision to put Romero at substantial risk of harm. As to Diaz and Clark, the complaint does not plead facts showing that they made any decision at all with respect to Romero. (*See* Compl. ¶¶ 1-23.) Plaintiff's second cause of action should be dismissed.

IV. PLAINTIFF FAILS TO STATE A CLAIM FOR SUPERVISORY LIABILITY.

Plaintiff's third cause of action is for supervisory liability against Diaz, Clark, Burns, and Does 1-15. Specifically, Plaintiff asserts that those Defendants "knew and had been put on notice that their subordinates Does [sic] were engaging in conduct in violation of written policy and knew or reasonably should have known that his conduct would deprive Plaintiff of those rights." (Compl. ¶ 44.)

"Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). The Supreme Court has rejected liability on the part of supervisors for "knowledge and acquiescence" in subordinates' wrongful discriminatory acts. *Id.* at 677 ("[R]espondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument.") Supervisors may be liable for playing "an affirmative part in the alleged deprivation of constitutional rights." *Rise v. Oregon*, 59 F.3d 1556, 1563 (9th Cir. 1995) (internal quotation marks omitted). A defendant may be held liable as a supervisor under § 1983 "if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989).

Here, Plaintiff makes no factual allegations at all of supervisory conduct by Defendant Burns. (*See* Compl. ¶¶ 1-23.) The generic statement that Defendants "knew and had been put on notice that their subordinates Does were engaging in conduct in violation of written policy and knew or reasonably should have known that his conduct would deprive Plaintiff of those rights" (Compl. ¶ 44) is a conclusory allegation reciting the element of the claim, and is therefore

insufficient to defeat a motion to dismiss. *See Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004). Accordingly, the supervisory liability claims against Burns should be dismissed.

Plaintiff makes similar conclusory allegation that Defendant Clark that he "failed to properly supervise defendants . . . and thus permitted Burns and Does to ignore the proper administrative procedure for placing one inmate in the cell of another inmate," that Defendants Clark and Diaz "failed to supervise subordinates to ensure that a violent inmate never otherwise permitted to share a cell was actually prevented from sharing a cell," and that Clark and Diaz "failed to supervise Defendants responsible for conducting nighttime safety checks." (Compl. ¶¶ 19, 21.) Again, those assertions are simply conclusory allegation reciting the elements of the claim, and are not sufficient to defeat a motion to dismiss. Such "naked assertion(s)" devoid of "further factual enhancement" cannot state a claim. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2006). A claim for supervisory liability is stated only where plaintiff pleads "sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Henry A. v. Willden*, 678 F.3d 991, 1004 (9th Cir. 2012) (affirming dismissal of supervisory claims that did "not allege that [supervisors] had any personal knowledge of the specific constitutional violations that led to Plaintiffs' injuries, or that they had any direct responsibility to train or supervise the [subordinates accused of direct constitutional violations]"). Plaintiff fails to allege *facts* showing that Defendants knew Romero was in danger, and fails to allege *facts* showing that Defendants knew that there was a problem with Corcoran officers ignoring housing protocols. (*See* Compl. ¶¶ 1-23.) Further, the complaint's allegation of a single incident is insufficient to demonstrate supervisory liability. *See Doe v. City of San Diego*, 35 F. Supp. 3d at 1229.

Plaintiff further asserts that Diaz and Clark did not establish certain policies, alleging that they "failed to establish a procedure to document and track when inmates agree in writing to be housed with another" and "failed to establish a system that would ensure crucial nighttime safety checks are conducted." (Compl. ¶¶ 19, 21.) A supervisor may only be held liable based on a policy where that policy is "so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." *Jeffers v. Gomez*, 267 F.3d 895,

915 (9th Cir. 2001). The pleading must identify a specific policy and establish a "direct causal link" between that policy and the alleged constitutional deprivation. *See, e.g., City of Canton v. Harris*, 489 U.S. 378, 385 (1989); *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992). Plaintiff's allegation that Defendants did not adopt additional inmate housing policies does not show that Defendants repudiated Decedent's constitutional rights, and do not show a causal link between the policy in place and Decedent's death. (*See Compl.* ¶¶ 1-23.)

Plaintiff fails to plead facts showing that Defendants' supervisory conduct violated Decedent's constitutional rights. The claims for supervisory liability should be dismissed.

V. PLAINTIFF FAILS TO STATE A CLAIM FOR LOSS OF FAMILIAL RELATIONS.

Plaintiff's fourth cause of action is for loss of familial relations against all Defendants. Parents and children may assert a Fourteenth Amendment substantive due process claim if they are deprived of a liberty interest in the companionship and society of their child or parent through official conduct. *Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1075 (9th Cir. 2013). Although a Fourteenth Amendment substantive due process claim is technically distinct from an Eighth Amendment claim, where the claim is predicated upon other conduct that is alleged to be unconstitutional, a finding that the other conduct was constitutional generally will preclude recovery for interference with familial relationship. *See, e.g., Gausvik v. Perez*, 392 F.3d 1006, 1008 (9th Cir. 2004). Here, Plaintiffs' Fourteenth Amendment claim is based on the assertions of constitutional violations in the first, second, and third causes of action. (Compl. ¶ 50.) Accordingly, for the reasons stated above, the fourth cause of action should be dismissed as well. *See supra* §§ II-IV.

VI. PLAINTIFF FAILS TO STATE A CLAIM FOR CONSPIRACY.

Plaintiff's fifth cause of action asserts a claim for conspiracy to violate civil rights. In particular, Plaintiff asserts that this cause of action arises under 42 U.S.C. §§ 1983, 1985, and 1988. (Comp. ¶ 54.)

Section 1988 addresses the applicability of common law, as well as availability of attorneys' fees and expert fees, in certain civil actions. It does not create a separate cause of

action. (*See* 42 U.S.C. § 1988.) Accordingly, Plaintiff's conspiracy claims based on §1988 should be dismissed.

A claim based on § 1985(3) must allege that defendants acted from "racial, or perhaps otherwise class-based, invidiously discriminatory animus" in conspiring to deprive plaintiff of equal protection of the laws. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *see also Toler v. Paulson*, 551 F. Supp. 2d 1039, 1048 (E.D. Cal. 2008). Plaintiff alleges no such animus, and does not allege any equal protection violation. Accordingly, Plaintiff's conspiracy claims based on § 1985 should be dismissed.

Moreover, "[a] claim under [§ 1985] must allege facts to support the allegation that defendants conspired together. A mere allegation of conspiracy without factual specificity is insufficient." *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 626 (9th Cir. 1988). Here, Plaintiff's assertions with regard to conspiracy generically recite the elements of the claim as to all Defendants, without pleading any facts as to the alleged conspiracy. (Compl. ¶ 55.) Accordingly, even if a § 1985 conspiracy claim were appropriate here, Plaintiff has not pled sufficient facts to state a claim for conspiracy. *See also Iqbal*, 556 U.S. at 678 (a pleading that offers only a "formulaic recitation of the elements" of a cause of action fails to state a claim).

In order to allege a conspiracy under § 1983, a plaintiff must plead facts showing "an agreement or 'meeting of the minds' to violate constitutional rights." *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002). The complaint pleads no facts showing such an agreement. Plaintiff uses the term "meeting of the minds" but only as a generic recitation of the elements of the claim. (Compl. ¶ 55.) Such a "naked assertion" does not meet the requirements for proper pleading. *See Iqbal*, 556 U.S. at 678. Accordingly Plaintiff fails to plead facts sufficient to state a conspiracy claim, and the conspiracy claim should be dismissed.

Further, a conspiracy claim under § 1983 claim requires "an actual deprivation of constitutional rights." *Hart v. Parks*, 450 F.3d 1059, 1071 (9th Cir. 2006). As set forth above, Plaintiff has not properly pled a constitutional violation. (*See supra* §§ II-V.) Plaintiff's conspiracy claim should be dismissed for that reason as well.

VII. MOVING DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY ON PLAINTIFF'S FEDERAL CAUSES OF ACTION.

A. Legal Standard for Qualified Immunity

Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Ziglar v. Abbassi*, 137 S. Ct. 1843, 1867 (2017) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (same). The rule permits officials to undertake their responsibilities without fear that they will be held liable in damages for actions that appear reasonable at the time but are later held to violate statutory or constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982); *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (en banc). Thus, qualified immunity prohibits second-guessing prison officials, even where it is plausible that the situation could have been handled differently. *See Ziglar*, 117 S. Ct. at 1866 (stating that qualified immunity gives officials "the breathing room to make reasonable but mistaken judgments"); *City and Cnty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1777 (2015) (quoting *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994)). Qualified immunity is also intended to free government officials from the concerns of litigation, including "avoidance of disruptive discovery." *Iqbal*, 556 U.S. at 685. Because the "driving force" behind qualified immunity is a desire to ensure that insubstantial claims against government officials will be resolved before discovery, the Supreme Court has stressed the importance of resolving immunity questions at the earliest possible stage in litigation. *Pearson*, 555 U.S. at 231-32.

Courts analyze qualified immunity under a two-prong test: (1) whether the alleged facts constitute a constitutional violation and (2), if so, whether the constitutional right at issue was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Courts may decide which of the two prongs to analyze first based on the circumstances of the case. *Pearson*, 555 U.S. at 236. "The proper inquiry focuses on whether 'it would be clear to a

reasonable officer that [the defendant's] conduct was unlawful in the situation confronted' . . . or whether the state of the law [at the relevant time] gave 'fair warning' to the officials that their conduct was unconstitutional.'" *Clement v. Gomez*, 298 F.3d 898, 906 (9th Cir. 2002) (citing *Hope v. Pelzer*, 536 U.S. 730, 731 (2002)). To overcome qualified immunity, "existing precedent must have placed the statutory or constitutional question beyond debate." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (per curiam) (quoting *al-Kidd*, 563 U.S. at 741). Plaintiff bears the burden of demonstrating that the constitutional right in question was clearly established at the time officials acted. *May v. Baldwin*, 109 F.3d 557, 561 (9th Cir. 1997).

The right at issue must be framed specifically to appropriately assess whether it was clearly established that the alleged conduct was unconstitutional. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). The focus of the inquiry is "whether the violative nature of *particular* conduct is clearly established," and whether the unlawfulness of the official's conduct was apparent. *Ziglar*, 137 S. Ct. at 1866 (citing *Mullenix* and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis in original).

B. Defendants Are Entitled to Qualified Immunity.

Qualified immunity applies unless, given the available case law at the time, and knowing what defendant knew, every reasonable officer would have understood that the failure to act was unconstitutional. *Horton v. City of Santa Maria*, 915 F.3d 592, 600 (9th Cir. 2019).

Here, Plaintiff alleges Defendant Diaz and Clark were the Secretary of CDCR and the warden at Corcoran, respectively, but does not allege facts showing that they knew that Romero and Osuna were going to be housed together, or that they knew of any danger to Romero. (Compl. ¶ 19.)

Accordingly, as to those Defendants, to avoid qualified immunity, Plaintiff must show that it was clearly established that prison officials with no knowledge of an inmate housing situation are constitutionally required to act to prevent the risk caused by two particular inmates being housed together.

No case law clearly established such an obligation. Indeed, as stated above, it was clearly established that officials are not responsible for the acts of their subordinates of which they have

no knowledge. *See Iqbal*, 556 U.S. at 676. Diaz and Clark are entitled to qualified immunity as to Plaintiff's claims.

As to Defendant Burns, Plaintiff asserts he "ignored the usual protocol" to determine to determine whether two inmates are an appropriate fit as cellmates, then have each inmate sign forms agreeing to be celled together. (Compl. ¶¶ 14-15.) But the complaint does not allege facts showing that Burns knew of a danger to Romero.

Therefore, to avoid qualified immunity as to Burns, Plaintiff must show that it was clearly established that a correctional sergeant violates an inmate's constitutional rights when he places that inmate in a cell with another inmate without using the usual protocol, despite being unaware of any danger.

Again, no case law clearly establishes that conduct is a constitutional violation. As stated above, for a deliberate indifference claim, Plaintiff must meet that subjective requirement that Defendant knew of, and disregarded, a serious risk of substantial harm. *Hearns*, 413 F.3d at 1040. In *Estate of Ford*, the Ninth circuit found an officer accused of housing two inmates together without following the proper protocol was entitled to qualified immunity because a reasonable officer "would not necessarily have suspected that celling [the inmates together] posed an excessive or intolerable risk of serious injury." *Ford v. Ramirez-Palmer (Estate of Ford)*, 301 F.3d 1043, 1052 (9th Cir. 2002). Specifically, the Ninth Circuit found "it would not be clear to a reasonable prison official when the risk of harm from double-celling psychiatric inmates with one another changes from being *a* risk of *some* harm to a *substantial* risk of *serious* harm." *Id.* at 1051. Even if the pleadings in the complaint are true, it would not have been clear to Burns that he was violating an inmate's constitutional rights by not following the housing protocol, because he was not aware of a substantial risk of serious harm. Accordingly, Burns is entitled to qualified immunity to Plaintiff's federal claims.

VIII. PLAINTIFF FAILS TO STATE A CLAIM FOR NEGLIGENT SUPERVISION.

Plaintiff's sixth cause of action is for "Negligent Supervision, Training and Staffing" under Civil Code section 1714 and Government Code section 844.6(d). (Compl. 13.)

Section 1714 is a general tort provision stating that "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person." (Cal. Civ. Code § 1714.) Government code section 844.6 states that "[n]othing in this exonerates a public employee from liability for injury caused by his negligent or wrongful omission." (Cal. Gov't Code § 844.6.) The conduct Plaintiff asserts for this cause of action is that Defendants "failed to supervise" the nighttime safety check process, and "failed to impress upon their subordinates of the high-risk placement [sic]," and "failed to ensure that their subordinates conducted regular safety checks." (Compl. ¶59.)

A. Defendants Are Immune from Plaintiff's Negligent Supervision Claim Under Government Code Section 820.8.

First, Defendants are immune from these failure-to-supervise claims under Government Code section 820.8. Under California law, state employees are not liable for injuries caused by an act or omission of a third party, but only for their own actions. (Cal. Gov't Code § 820.8.) The immunity provisions of the California Tort Claims Act (Cal. Gov't Code § 810 et seq.) generally prevail over liabilities established by other statutes. *Wright v. State of Calif.*, 122 Cal. App. 4th 659, 671 (Cal. App. 2004). Thus, direct tort liability for a public employee may not be premised on acts of subordinates or of other government employees. *Weaver By and Through Weaver v. State*, 63 Cal. App. 4th 188, 202 (Cal. App. 1998) (determining that a supervisor was immune under section 820.8 for the actions of his subordinates).

Here, Plaintiff asks the Court to find Defendants liable based on the actions of others, asserting that Defendants are liable for the injuries allegedly caused by acts of their subordinates and inmate Osuna. (Compl. ¶¶ 59-60.) Defendants are immune from those allegations under section 820.8.

Plaintiff may argue that Government Code section 820.8 provides immunity "[e]xcept as otherwise provided by statute," and that therefore Defendants can be liable under Civil Code section 1714. However, "direct tort liability of public entities must be based on a specific statute

declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714." *Eastburn v. Reg'l Fire Prot. Auth.*, 31 Cal. 4th 1175, 1183 (Cal. 2003). Section 820.8 immunity applies, and Defendants are immune from Plaintiff's claims for negligent supervision.

B. Plaintiff Fails to Plead Facts Showing Negligent Supervision.

The interpretation of Federal Rule of Civil Procedure 8 in *Twombly* governs all civil actions, including claims based on state law, in federal court. *Iqbal*, 556 U.S. at 684. To state a claim for negligent supervision, Plaintiff must plead *facts*, not merely conclusions, showing Defendants were negligent. *Id.* at 678.

Under California law, negligence is stated where a defendant is obligated to conform to a certain standard of conduct to protect others from unreasonable risks (duty); defendant fails to conform to that standard (breach of duty); there is a reasonably close connection between the defendant's conduct and the resulting injuries (proximate cause); and plaintiff suffers actual loss (damages). *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009) (quoting *McGarry v. Sax*, 158 Cal. App. 4th 983, 994 (Cal. App. 2008)).

Here, Plaintiff asserts that Defendants "failed to supervise" their subordinates in their safety checks and inmate placement. (Compl. ¶ 59.) But no facts are pled to support those assertions. (*See* Compl. ¶¶ 1-23.) Indeed, as to all three Defendants, the complaint simply concludes that they "failed to supervise" their subordinates, without providing any facts as to their knowledge of the situation, their duties to Decedent (if any), or their supervisory conduct. (*See id.*) Such conclusory allegations are insufficient to state a claim. *See Twombly*, 550 U.S. at 555.

C. Plaintiff Fails to Plead Recoverable Damages for the Negligent Supervision Claim.

The wrongful death action under California Code of Civil Procedure section 377.60 completely occupies the field for an action brought by the heirs for their damages to the exclusion of any other action or remedy. *See Vander Lind v. Superior Court*, 146 Cal.App.3d 358, 364 (1983). Accordingly, the negligent supervision claims can be brought only on Decedent's behalf

in a representative capacity by Decedent's successor in interest. *See* Cal. Code Civ. Proc. § 377.30 et seq.

California Code of Civil Procedure Section 377.34 limits damages for a successor in interest to "the loss or damage that the decedent sustained or incurred before death." Here, Plaintiff asserts only damages occurring after Decedent's death, such as Plaintiff Solares's "emotional, mental and physical pain and injuries." (Compl. ¶¶ 24-28.) Those damages were sustained by Plaintiff, not Decedent, and occurred after death. They are not recoverable under Plaintiff's sixth cause of action. Plaintiff does not seek injunctive or declaratory relief (*see* Compl. 17), accordingly Plaintiff's sixth cause of action should be dismissed for failure to state a claim on which relief may be granted.

IX. PLAINTIFF FAILS TO STATE A CLAIM FOR WRONGFUL DEATH.

For their seventh cause of action, Plaintiff asserts wrongful death under Code of Civil Procedure section 377.60. (Compl. ¶¶ 62-65.)

Plaintiff asserts that moving Defendants "committed intentional or negligent misconduct that caused the untimely and wrongful death of Luis Romero," apparently basing that assertion on the factual allegations of previous paragraphs. (Compl. ¶¶ 62-63.) For similar reasons to those stated above with regard to negligent supervision, Defendants are immune from Plaintiff's wrongful death claims, and Plaintiff fails to plead facts supporting those claims.

A. Defendants Are Immune from Plaintiff's Wrongful Death Claims Under Government Code Section 820.8.

For their wrongful death claims, Plaintiff asks the Court to find Defendants liable based on all of the allegations in the complaint. (*See* Compl. ¶ 62.) The factual allegations against Defendants Diaz, Burns, and Clark consist of the allegation that they supervised others who did not follow protocol with regard to housing inmates together, or hourly cell checks (Compl. ¶¶ 19, 21, 59), and that Defendant Burns did not follow protocol with respect to housing inmates together. (Compl. ¶ 14.)

As to the supervisory allegations, as stated above, Defendants are immune under Government Code section 820.8. Direct tort liability for a public employee may not be premised on acts of subordinates or of other government employees. *Weaver By Weaver*, 63 Cal. App. 4th at 202. All of Plaintiff's wrongful death claims against Diaz and Clark, as well as those based on supervisory allegations against Defendant Burns, should be dismissed because Defendants are immune under section 820.8.

B. Plaintiff Fails to Plead Facts Showing Defendants Are Liable.

A cause of action for wrongful death consists of a tort (negligence or other wrongful act), the resulting death, and the damages suffered by the heirs. *Quiroz v. Seventh Ave. Ctr.*, 140 Cal. App. 4th 1256, 1263 (Cal. App. 2006).

As stated above, Plaintiff pleads no facts showing that Defendants' conduct caused Decedent's death. Rather, the supervisory allegations simply conclude that Defendants "failed to supervise" their subordinates, without providing any facts as to their knowledge of the situation, their duties to Decedent (if any), or their supervisory conduct. (*See supra* § IX.B.) Those conclusory allegations are insufficient to state a claim. *See Twombly*, 550 U.S. at 555.

Plaintiff also alleges that Burns "ignored the usual protocol" before celling two inmates together. (Compl. ¶ 14.) That allegation does not show that conduct caused Plaintiff's alleged harm. To be considered a proximate cause, conduct must be a "substantial factor" in contributing to the harm. (CACI No. 400.) Here, no facts are pled showing that if Burns had followed the protocols, there would have been a different result. (*See* Compl. ¶¶ 1-23.) Accordingly, the complaint fails to plead facts showing that Burns's conduct caused the alleged harm, and this cause of action should be dismissed for that reason as well.

X. PLAINTIFF FAILS TO JOIN DECEDENT'S FATHER, A NECESSARY PARTY.

The California wrongful death cause of action may be asserted by a decedent's "surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession." Cal. Code. Civ. Proc. § 377.60(a). Here, Plaintiff asserts there is no surviving spouse or issue. (Solares Decl. ¶ 2, ECF

No. 2-1.) Accordingly, the cause of action may be asserted by the heirs by intestate succession. *See* Cal. Code. Civ. Proc. § 377.60(a). Under California law where there is no surviving spouse or issue, the estate passes to "the decedent's parent or parents equally." Cal. Prob. Code § 6402(b).

The complaint in this matter names only Solares, Decedent's mother, as a Plaintiff. (Compl. ¶ 4.) The death certificate attached to the complaint names Decedent's father, Victor Manuel Romero Gonzalez. (Certificate of Death, ECF No. 2-1 at 4.)

In California wrongful death actions, heirs have a "mandatory duty to join all known omitted heirs in [a] single action." *Ruttenberg v. Ruttenberg*, 53 Cal. App. 4th 801, 808 (Cal. App. 1997) (internal quotation marks omitted). Under Federal Rule of Civil Procedure 19, a person is required to be joined if feasible where that person's absence would "impede the person's ability to protect [his] interest," or "leave an existing party subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Fed R. Civ. P. 19(a)(1)(B).

Here, Mr. Romero Gonzalez is a known, omitted heir who should have been joined in this action. *Ruttenberg*, 53 Cal. App. 4th at 808. If joining Mr. Romero Gonzalez is not feasible, Plaintiff should have pled the reasons for nonjoinder. *See* Fed. R. Civ. P. 19(c). Because Plaintiff has not joined a required party, or stated any reasons why he cannot be joined, the complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(7). *See Dredge Corp. v. Penny*, 338 F.2d 456, 464 (9th Cir. 1964) (If an indispensable party is not joined, "the action is subject to dismissal.").

XI. PLAINTIFF'S EIGHTH CAUSE OF ACTION SHOULD BE DISMISSED.

Plaintiff asserts an eighth cause of action for failure to summon medical care against unidentified Doe defendants only. (Compl. ¶¶ 66-70.) As set forth above, all of Plaintiff's federal claims should be dismissed. (*See supra* §§ I-VII.) Once all of the federal claims are dismissed, the Court should decline to exercise supplemental jurisdiction over the state-law claims, and therefore dismiss the eighth cause of action (asserted only against Doe defendants), and any other state-law claims that might remain. *See* 28 U.S.C. § 1367(c)(3) (A district court

may decline to exercise supplemental jurisdiction after dismissing "all claims over which it has original jurisdiction.").

CONCLUSION

Defendants, sued in their official capacities, are entitled to sovereign immunity as to all of Plaintiff's claims. In addition, Plaintiff's complaint fails to identify any conduct on the part of Defendants that caused the damages alleged here. Defendants also enjoy qualified immunity and statutory immunity from Plaintiff's claims. Defendants' motion to dismiss should be granted.

Dated: May 21, 2020

Respectfully Submitted,

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